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July 14, 1992

BY HAND DELIVERY

Ms. Donna R. Searcy,
Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, DC 20554

RE: PR Docket No. 92-80; RM 7909

Dear Ms. Searcy:

Transmitted herewith for filing in the above-referenced docket on behalf of Indiana Higher Education Telecommunication System, Northeastern University and Trans Video Communications, Inc., are an original and five copies of their "Joint Reply Comments On Notice Of Proposed Rule Making."

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,

William D. Wallace
William D. Wallace
(Member of Florida Bar only)

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 14 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Parts 1, 2, and)
21 of the Commission's Rules)
Governing the Use of)
Frequencies in the 2.1 and)
2.5 GHz Bands)
)

PR Docket No. 92-80
RM 7909

To: The Commission

JOINT REPLY COMMENTS ON NOTICE OF PROPOSED RULE MAKING

Pursuant to Section 1.415 of the Commission's Rules, Indiana Higher Education Telecommunication System (IHETS), Northeastern University (Northeastern), and Trans Video Communications, Inc. (TVC), by their attorneys, submit these reply comments in the above-referenced docket in response to comments submitted on the Notice of Proposed Rule Making ("Notice"), FCC 92-173, released May 8, 1992.

- I. OPPOSITION BY BOTH MDS AND ITFS OPERATORS TO THE COMMISSION'S PROPOSED RULES ON INSTITUTING SEPARATION REQUIREMENTS AND ELIMINATING INTERFERENCE ANALYSES DEMONSTRATE THAT THESE PROPOSALS ARE CONTRARY TO THE PUBLIC INTEREST.

In their "Joint Comments" in this proceeding, IHETS, Northeastern and TVC opposed the Commission's proposals to replace the current engineering standard for locating MDS stations with a fixed separation requirement and to withdraw interference protection from new MDS facilities for ITFS receive sites. Among the ITFS and MDS parties commenting on these proposals, there was

near universal opposition and recognition that the proposed rules are contrary to the public interest.

A. The Use of Separation Requirements Would Have Detrimental Effects on Both MDS and ITFS.

IHETS, Northeastern and TVC pointed out that the use of a separation standard for locating new MDS stations near ITFS facilities is precluded by the manner in which ITFS facilities must be engineered to transmit signals to specific receive sites. In order to provide efficient and reliable service, each receive site must be protected from harmful interference no matter how far it may be from the ITFS transmitter. The use of service areas "is fundamentally incompatible with the specific purpose and unique needs of ITFS." Wireless Cable Service, 5 FCC Rcd 6410, 6419, ¶ 59 (1990).

These sentiments were echoed by other ITFS commenters. See, e.g., Joint Comments of ITFS Parties, at 6-8; Comments of National ITFS Association, at 6-7. Additionally, it was pointed out that separation requirements simply do not work in areas where the terrain is mountainous and transmitting antennas must be placed in elevated locations. See Comments of Roman Catholic Communications Corporation of the Bay Area, at 3-4.

Similarly, MDS operators pointed out that a separation standard does not account for terrain features, and so, reduces the flexibility available to design MDS stations. See, e.g., Comments of the S. Roberts Company, at 10-12; Comments of Tangent TV Cable Company, at 1-2; see also Comments of Satellite Sys. Int'l, Inc.

MDS operators also recognized that the loss of flexibility in engineering systems would seriously impair the development of wireless cable systems, and that use of separation standards "poses a significant threat to the continued viability of existing wireless cable systems." Comments of Consortium of Concerned Wireless Cable Operators, at 10; see also Comments of Kingswood Associates, at 8 (present system allows for "extraordinary level of flexibility in designing MDS stations").

In short, both ITFS and MDS operators agree that the use of a separation standard, rather than an engineering standard, for locating MDS stations is a flawed idea, and would be detrimental to the development of both ITFS and MDS. Accordingly, the Commission should reject this proposal.

B. Elimination of ITFS Interference Analyses Is Contrary to the Public Interest.

IHETS, Northeastern and TVC explained in their Joint Comments how the Commission's proposal to eliminate the requirement that MDS applicants perform interference analyses with respect to existing ITFS facilities would seriously impair the ability of these ITFS stations to continue operations at their current levels of service.

As the Joint Commenters pointed out, this proposal is logistically and technically not feasible. ITFS operators would not have sufficient opportunity to evaluate interference in the limited time frame proposed by the Commission. Furthermore, adopting a rule which allows MDS transmissions to become unconditional with respect to ITFS interference protection would

constitute a drastic reversal of the Commission's ITFS policies in effect for the last 30 years.

Other ITFS parties commenting on this proposal agreed that it was unworkable for the same reasons pointed out in the Joint Comments. See Comments of Roman Catholic Communications Corporation of the Bay Area, at 6-8; Comments of National ITFS Association, at 7-9.

MDS commenters were not opposed to retaining the current procedures and standards for protecting ITFS facilities. As one MDS operator pointed out, the requirement of an interference analysis is not overly burdensome and reduces the filing of speculative MDS applications. Comments of Kingswood Associates, at 9.

IHETS, Northeastern and TVC cannot emphasize strongly enough that the proposal to eliminate interference analyses would gravely impair their operations. Adoption of such a rule would lead to the elimination of many receive locations because of the impossibility of protecting them from new MDS stations. As a result, students at those sites would no longer receive much-needed instructional program, contrary to the public interest. The proposal to change current interference protection for co-channel and adjacent channel ITFS facilities must be rejected.

II. COMMENTERS AGREED THAT SEVERAL ADMINISTRATIVE PROPOSALS HAD MERIT AND SHOULD BE IMPLEMENTED.

The Joint Commenters recommended that the Commission process both ITFS and MDS under Part 74 of its Rules, and assign such processing to the Mass Media Bureau. They also suggested that

processing of MDS applications would be improved if the Commission were to eliminate pre-lottery settlements.

The parties commenting on these proposals were again nearly unanimous in recommending that the Mass Media Bureau process both ITFS and MDS applications. See, e.g., Comments of National ITFS Association, at 3-5; Comments of Wireless Cable Connection, Inc., at 2; Comments of Office of Advocacy, Small Bus. Admin., at 14. The Commission should heed the advice of the ITFS and MDS commenters, whose applications are being processed, and assign the administration of MDS and ITFS to a single branch in the Mass Media Bureau.

Developers of MDS systems also agreed that pre-lottery MDS settlements should be eliminated to reduce the abuses of application mills.^{1/} See Comments of Kingswood Associates, at 13; Comments of WJB-TV Melbourne L.P., at 12-13; see also Comments of Baypoint TV, Inc., at 10. Thus, even those parties who might potentially benefit from settlement groups recognize that this policy has allowed substantial abuse and contributed to the Commission's difficulties in the timely processing MDS applications. Settlement groups should be prohibited.

^{1/} The "cookie-cutter" comments filed on this issue simply confirm the need to eliminate all loopholes for abuse of the MDS rules by application mills.

III. LIKE THE JOINT COMMENTERS, OTHER PARTIES RECOGNIZED THAT THE CURRENT RULES ARE NOT THE SOURCE OF THE COMMISSION'S PERCEIVED APPLICATION GRIDLOCK AND THAT THE PROPOSED RULES WOULD NOT RESOLVE THE PROBLEMS.

IHETS, Northeastern and TVC pointed out in their comments that the current rules are not the source of the Commission's putative problems in processing applications. Rather, the Commission's policies on MDS have fostered a large volume of speculative applications, and its staff resources have apparently been simply insufficient to handle this overload. MDS operators, which have actually experienced the system, echoed these comments. See e.g., Comments of Wireless Cable Connection, Inc., at 2-4; Comments of Kingswood Associates, at 13.

The comments submitted in this docket thus demonstrate that the Commission has no rational basis to promulgate the rules which would impose separation standards on ITFS facilities and withdraw interference protection for ITFS stations on co-channels and adjacent channels with new MDS facilities.^{2/} Moreover, such rule changes would burden ITFS operators with significant increases in administrative and financial burdens at a time when budgets are being cut and instructional programs eliminated.

Balanced against the need for technology like ITFS which can efficiently and reliably deliver instructional program to many

^{2/} Furthermore, adoption of such rules would not resolve any current application backlog, because retroactive application of new regulations is contrary to judicial precedent. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). ITFS operators in pending negotiations over electrical interference with MDS applicants would be substantially prejudiced by adoption and retroactive application of rules which eliminated the requirement of an MDS interference analysis.

students, and the recognized detrimental effect of the proposed rules on both ITFS and MDS, the Commission has no justification for adopting rules which would further impair the ability ITFS operators to serve their communities. In any event, as the Joint Comments pointed out, the proposed rules would effect a radical shift in direction on Commission policies for ITFS, for which there is no explanation, justification or rationale in the Notice.

On the other hand, the commenting parties commended the Commission for compiling a data base for ITFS and MDS transmitters and receive sites, and recognized that properly maintained, such a data base would speed the application process. See, e.g., Comments of Kingswood Associates, at 14-15; Joint Comments of ITFS Parties, at 10. IHETS, Northeastern and TVC agree that a composite data base, which is kept up to date, would promote efficient processing of applications for both MDS and ITFS.

However, as was pointed out, the Commission proposed only to publish the MDS data for comment; if the data base were to serve any useful purpose, then ITFS operators must also have a chance to review and correct the information in it. See Joint Comments of ITFS Parties, at 10-11 (also noting that additional ITFS information should be collected).

IV. CONCLUSION.

IHETS, Northeastern and TVC pointed out that the Commission's has already considered and rejected many of the rules proposed in the Notice. Three major rulemakings for ITFS and MDS have occurred within the last two years, and the Commission's attempt

develop MDS is no closer today than when the first of these was initiated over two years ago. See Notice of Proposed Rule Making and Notice of Inquiry, 5 FCC Rcd 971 (1990).

The Joint Commenters also pointed out that, in addition to the economic difficulties facing MDS, the Commission's own policies on MDS, which have allowed abuse of the administrative process, have contributed to the failure of that service. Now, even MDS operators oppose the Commission's tinkering with the MDS rules to "foster" its development. As one MDS commenter stated: "Regulatory flip-flops occur[r]ing every several years do not create an atmosphere to attracting the financing essential to growth of the wireless cable industry." Comments of National Micro Vision Systems, Inc., at 3.

For the reasons outlined in their comments and the comments of many parties in this proceeding, IHETS, Northeastern and TVC urge the Commission to retain the current interference protection policies for MDS applicants with respect to existing and previously applied-for co-channel and adjacent-channel ITFS stations. The proposals in the Notice would cripple the ability of ITFS licensees to provide much-needed instructional programming at their current levels of service and eliminate their ability to expand such programming. They would also not benefit MDS because they would restrict the flexibility of that service.

The Commission's historical commitment to ITFS and the public interest require the Commission to reject these proposals and to

retain current ITFS protections based upon an engineering standard.

Respectfully submitted,

INDIANA HIGHER EDUCATION
TELECOMMUNICATION SYSTEM,

NORTHEASTERN UNIVERSITY, and

TRANS VIDEO COMMUNICATIONS, INC.

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Dated: July 14, 1992

CERTIFICATE OF SERVICE

I, William D. Wallace, hereby certify that I have on this 14th day of July, 1992, caused copies of the foregoing "Joint Reply Comments on Notice of Proposed Rule Making" to be served by hand delivery (as indicated with *) or by U.S. mail, postage prepaid, to the following:

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